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NO. 86-98

In The
SUPREME COURT OF THE UNITED STATES

October Term, 1986

Gregory L. Rivera,
Appellant

V.

Jean Marie Minnich,
Appellee

On Appeal From The
Supreme Court Of Pennsylvania

BRIEF FOR APPELLEE

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QUESTION PRESENTED

Does the Pennsylvania statute which permits paternity to be determined only by a "preponderance of the evidence" violate the Due Process Clause of the Fourteenth Amendment to the United States Constitution?

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I. Course Of Proceedings

This is an appeal from a decision of the Supreme Court of Pennsylvania which held that the preponderance standard of proof statutorily required in Pennsylvania, 42 Pa.C.S.A. 6704(g), for paternity proceedings does not violate the Due Process Clause of the Fourteenth Amendment of the United States Constitution. U.S. Const. Amend. XIV §1.

On May 28, 1983, Jean Marie Minnich, Respondent, gave birth to a baby boy, Cory Michael Minnich. Miss Minnich was unwed at the time the baby was born. In an effort to obtain support for her child, on June 17, 1983, Miss Minnich brought a paternity action against Gregory L. "Pete" Rivera, Petitioner, in the Court of Common Pleas of Lancaster County, Pennsylvania. Miss Minnich and the child were recipients of Public Assistance. Miss Minnich was requested to disclose the name of the child's father in order to secure

support for the child from his parent. This disclosure is fostered by 42 U.S.C. §654-(4) [42 U.S.C.S. § 654-(4)] which directs states to establish paternity when possible in order to reduce substantial outlays of taxpayers' money used to support children born out-of-wedlock. All parties were given proper notice and a support hearing was held before a domestic relations hearing officer on August 29, 1983. Neither party was represented by counsel. Mr. Rivera denied paternity of Cory Michael Minnich at the hearing. Due to the denial, Miss Minnich petitioned the Court for blood tests. Her petition was granted. All parties appeared for blood tests on October 31, 1983. The results of the blood test were received on November 21, 1983. The results showed a 94.60 percent probability of paternity via human leukocyte antigen blood groupings.

Another hearing was scheduled for March 20, 1984. Proper notice was given to

all parties. The hearing of March 20, 1984, was held before a domestic relations hearing officer. Mr. Rivera was represented by counsel. Miss Minnich was not represented by counsel. Mr. Rivera demanded a jury trial to which he was no longer entitled. Under Pennsylvania law, a defendant has ten (10) days after he signs a paternity denial to demand a jury trial, otherwise a bench trial is held. The Court was petitioned to allow Mr. Rivera to have a jury trial and the petition was granted on April 4, 1984. Between April 4 and April 24, 1984, a pre-trial conference was held and Mr. Rivera's motion for discovery was granted. Pre-trial, Mr. Rivera submitted a jury instruction which called for the clear and convincing evidentiary standard to be used. Mr. Rivera reasoned that the Pennsylvania statute requiring the preponderance standard at paternity trials was unconstitutional in that it violated his due process rights via the Fourteenth

Amendment of the United States Constitution. Mr. Rivera's jury instruction was denied.

A civil jury trial was held on April 24, 1984. The evidence presented at the trial was direct testimony from Jean Marie Minnich (Respondent); Mary Minnich (Respondent's sister); Jeanette Bowers (Deputy Director of the Domestic Relations Division of the Court of Common Pleas of Lancaster County, Pennsylvania); Harold Lehman (Roche Bio-Medical Laboratories); G. Lynn Ryals, Ph.D. (Director of Roche Bio-Medical Laboratories); Christopher Rivera (Petitioner's brother); Gregory L. Rivera (Petitioner); and Marie Rivera (Petitioner's sister). The child, Cory Michael Minnich, was called as a witness as evidence of the physical resemblance between the child and his father, Gregory L. Rivera. The child's birth certificate was admitted into evidence. The child's father's name was recorded as "Pete" Rivera, the name by

which the child's mother knew Gregory L. Rivera (Petitioner).

The jury found unanimously for Jean Marie Minnich that Gregory L. Rivera was the father of Cory Michael Minnich.

On May 7, 1984, Mr. Rivera filed a motion for a new trial on the grounds that the clear and convincing standard was improperly denied. Mr. Rivera's motion for a new trial was granted on October 19, 1984. The lower court's opinion was appealed directly to the Supreme Court of Pennsylvania. On March 21, 1986, the Supreme Court of Pennsylvania reversed the lower court's decision holding that the child's rights were central in a paternity proceeding and increasing the burden of proof to clear and convincing unduly risked depriving the child of those rights. This appeal followed.

STATEMENT OF THE CASE

II. Statement Of Facts

The evidence presented at trial proved the following. On May 28, 1983, Jean Marie Minnich gave birth to a son Cory Michael Minnich. (T.R. 21). Miss Minnich was 16 years old and unwed at the time. The child was conceived in the summer of 1982 while the mother was 15 years old. (T.R. 30). The child's father, Gregory L. "Pete" Rivera (Petitioner) was employed in the small town Miss Minnich resided. (T.R. 19, 55). Mr. Rivera, 23 and married, admitted having intercourse with the child's mother during the summer of 1982. (T.R. 55, 59). The child's mother met Mr. Rivera one summer evening as she and her sister were walking to a local store. (T.R. 22, 43, 45, 56). They passed a cafe across the street from the parking lot of Mr. Rivera's place of employment. Mr. Rivera was outside the cafe on his break and called to the sisters to

stop as they passed. They stopped and talked. (T.R. 22). After that initial meeting, Mr. Rivera and the child's mother had sexual intercourse two (2) or three (3) times in Mr. Rivera's van which was parked at his place of employment. (T.R. 23, 24, 40, 41). The child's mother had no other sexual relationships. (T.R. 25, 32, 59). Miss Minnich discovered she was pregnant at the end of August of 1982. (T.R. 19). She did not want anyone to know she was pregnant. (T.R. 25, 28). She did not go to a doctor until she was seven (7) months pregnant. (T.R. 25). Cory Michael Minnich was born May 28, 1983. (T.R. 21). His mother named Gregory L. "Pete" Rivera as the child's father on his birth certificate. (T.R. 21, 55). The mother applied for Public Assistance for herself and the child. (T.R. 28). She was required to identify the child's father. She identified Mr. Rivera and the paternity suit was instituted. Mr. Rivera has seen his

son two (2) times in the child's life -- when the blood tests were given and at the time of trial. (T.R. 27, 30).

SUMMARY OF THE ARGUMENT

I. The fundamental liberty interest of natural parents in the care, custody, and management of their child is particularly important and more substantial than money. Santosky v. Kramer, 445 U.S. 745 (1982). Once this Court has identified a fundamental liberty interest, it has mandated an intermediate standard of proof -- "clear and convincing evidence" to preserve fundamental fairness in a variety of proceedings (usually government initiated) that threaten the individual with deprivation of this fundamental liberty interest.

The difference in the parent/child relationship that was implicated in Santosky v. Kramer, 445 U.S. 745, and the lack of parent/child relationship in this case is clear and significant. The mere existence of a biological link does not merit equivalent constitutional protection.

Lehr v. Robertson, 463 U.S. 248, 261 (1983).

The importance of the familial relationship, to the individuals involved and to society, stems from the emotional attachments that derive from the intimacy of daily association, in promoting a way of life not just the fact of blood relationship. It is the coming forward to participate in the rearing of one's child that is granted extra constitutional protection not the spurning of one's child.

II. The Fourteenth Amendment provides that no state shall deprive any person of life, liberty or property without due process of law. When that Clause is invoked in a novel context an inquiry into the interests involved must be begun. Only after the interests have been identified can the adequacy of the State's process be evaluated. Mathews v. Eldridge, 424 U.S. 319 (1976).

When the interests of the child and mother in having the father held responsible

for some parent/child relationship, albeit it a financial one, are balanced against the interests of the father who wants nothing to do with a parent/child relationship, it cannot be said that the father's interest is paramount to the child's as to require that the risk of error be further allocated to the child's side. The child's interest in identifying a parent is paramount.

> The status of illegitimacy has expressed through the ages society's condemnation of irresponsible liaisons beyond the bonds of marriage. But visiting this condemnation on the head of the infant is illogical and unjust. Moreover, imposing disabilities on the illegitimate child is contrary to the basic concept of our system that legal burdens should bear some relationship to individual responsibility or wrongdoing. Weber v. Aetna Casualty & Surety Co., 406 U.S. 164, 175 (1972).

The interests of the state are also substantial. The public welfare dimensions of illegitimacy have become alarming. A recent estimate of 1985 Aid to Families with

Dependent Children suggests that total welfare expenditures attributable to teenage childbearing has doubled in the past ten (10) years to $16.6 billion. A conservative estimate of the number of unwed teenagers who give birth is 50 percent. Another estimate goes as high as 90 percent being unwed. Either way, it is obvious that a substantial portion of the AFDC outlays are attributable to children born out-of-wedlock to teenage mothers. "Risking The Future: Adolescent Sexuality, Pregnancy and Child-bearing", National Academy of Science, V. I, p. 133, 1987.

Having identified the interests, the state's process is clearly adequate. Paternity proceedings in Pennsylvania afford putative fathers the right to be heard and the right to notice, the two (2) basic components of due process. The right to a trial by a jury of one's peers or by a judge is granted by statute. 42 Pa.C.S.A. 6704(g).

Representation by counsel is assured by case law. Corra v. Coll, 305 Pa. Super. 179 (1982). Access to blood tests is assured by both statute and case law. Little v. Streater, 452 U.S. 1 (1981); Turek v. Hardy, 312 Pa. Super. 158 (1983); 42 Pa.C.S.A. 6131 et seq.

Petitioner has been afforded a panoply of due process rights and still clamors for one more. To increase the burden of proof to clear and convincing presents the child with an almost insurmountable burden of proof. The use of this evidentiary standard in a paternity proceeding creates an almost impenetrable barrier that works to shield otherwise invidious discrimination against an illegitimate child. This Court's holding in Gomez v. Perez, 409 U.S. 535, 538 (1973) prohibits this.

ARGUMENT

I. THERE IS NO VIOLATION OF THE DUE PROCESS CLAUSE. THE RIGHTS AFFORDED AN ESTABLISHED PARENT/CHILD RELATIONSHIP ARE NOT THE SAME RIGHTS AFFORDED A PARENT WHO SPURNS A PARENT/CHILD RELATIONSHIP.

Petitioner claims his non-interest in a parent/child relationship warrants the same constitutional protection as an already established parent/child relationship. Petitioner incorrectly compares himself to the wed parents in Santosky v. Kramer, 455 U.S. 745 (1982), the unwed father in Stanley v. Illinois, 405 U.S. 645 (1972), and the unwed father in Caban v. Mohammed, 441 U.S. 380 (1979).

A closer examination of the facts and the case law clearly demonstrates that Petitioner correctly belongs in the category of unwed parents who never chose a commitment to parental responsibilities and were found undeserving of substantial protection under

the Due Process Clause. Quilloin v. Walcott, 434 U.S. 246 (1978); Lehr v. Robertson, 463 U.S. 248 (1983).

The difference in the case at bar and Santosky v. Kramer, 455 U.S. 745 (1982), is both clear and significant. The differences are public policy issues and procedural issues. The holding in Santosky stands for the public policy determination that the family unit is a fundamental institution of our society which is deserving of substantial constitutional protection. The procedural safeguards in Santosky were weak. The procedural safeguards in the case at bar are strong.

In Santosky v. Kramer, 455 U.S. 745 (1982), this Court held that the clear and convincing standard of proof was constitutionally required when a state sought to destroy an already established family unit by separating parents from children. "The fundamental liberty interest of natural parents in the care, custody, and management

of their child does not evaporate simply because they have not been model parents or have lost temporary custody of their child to the State. Even when blood relationships are strained, parents retain a vital interest in presenting the irretrievable destruction of their family life. If anything, persons faced with forced dissolution of their parental rights have a more critical need for procedural protections than do those resisting state intervention in the ongoing family affairs. When the State moves to destroy weakened familial bonds, it must provide the parents with fundamentally fair procedures." at 455 U.S. 753, 754. The already formed family unit is clearly a fundamental liberty interest deserving of extra constitutional protection. The spurning of one's child clearly is not.

The public policy difference in the case at bar and Santosky v. Kramer, 455 U.S. 745 (1982), is both clear and significant. The Santoskys were a family -- physically,

emotionally and legally. They demonstrated a commitment, albeit an imperfect one, to the responsibilities of parenthood. They participated in the rearing of their children and formed one of, if not the most fundamental institution in our society -- a family. This interest in loving and caring for their children has substantial protection under the Due Process Clause.

Gregory L. Rivera, Petitioner, has never acted as a parent to Cory Michael Minnich. In fact, Mr. Rivera comes before the Court asking the Court to endorse a policy that will make it more difficult for a child born to him out-of-wedlock to ever know Mr. Rivera as a parent. Mr. Rivera, by choice, has never had any custodial, personal or financial relationship with his son.

The biological link that exists between Mr. Rivera and Cory Michael Minnich does not merit the same constitutional protection as the parent/child relationship

that existed between the Santoskys and their children. The biological link affords the natural father alone the opportunity to develop a relationship with his child. If the natural father does not grasp this opportunity and does not accept some responsibility for his child's future, the federal constitution does not compel a state to legislate a burden of proof that protects and condones such callous parental irresponsibility while causing the child an egregious loss.

The procedural differences are as clear as the public policy differences.

In Santosky, the state pitted itself against the family. The familial unit was already formed including the emotional bonds associated with a family unit. The state sought to separate the child from the parents. In the case at bar, the father, not the state, stands as the adversary to his own child.

In Santosky, the resources of the state were greater than the resources of the parents. This is not true of a paternity proceeding. The mother is the plaintiff on behalf of the child. She may be represented by private counsel. If she is indigent, she may be represented by the state through the District Attorney's Office. 42 Pa.C.S.A. 6711. Likewise, the father can retain private counsel. If the father is indigent, he is eligible for representation by a public defender. Corra v. Coll, 305 Pa. Super. 179, 451 A.2d 480 [illegible] 82). Petitioner is represented by a solo private practitioner and by a member of the largest civil law firm in Lancaster County, Pennsylvania. The mother is represented by one assistant district attorney whose job responsibilities require that she allocate 98 percent of her time litigating, with a speciality in physical and sexual child abuse. Both parties had access to

blood tests. Little v. Streater, 452 U.S. 1 (1981); 42 Pa.C.S.A. 6133. A full series of exclusionary and inclusionary blood tests were done by order of the Court. The human leukocyte antigen results showed a 94.60 percent probability of paternity. An expert witness testified as to the blood tests results at the time of trial on behalf of the mother and child.

In Santosky, a complex series of encounters between a social service agency, the parents and the child were presented to a judge to determine whether the children should be taken from the parents. By its very nature, a termination proceeding leaves an extremely important decision open to the subjective values of one human being, the judge. As this Court mentioned in Santosky, most families involved in termination proceedings come from lower socio-economic levels. This makes termination proceedings more vulnerable to judgments based on cultural

or class bias.

Parties to paternity actions come from all walks of life. Mr. Rivera was gainfully employed and had been for a number of years at the time the paternity suit was brought. Miss Minnich was a welfare recipient. Parties to paternity suits come from all social classes, educational levels and racial groups which means the proceedings are no more vulnerable to judgments based on cultural or class bias than any other legal proceeding or human activity. Furthermore, Mr. Rivera was judged by 12 members of the community who sat as jurors and had testimonial evidence along with the scientific blood tests results presented to them.

Stanley v. Illinois, 405 U.S. 645 (1972) stands for the protection of the rights of responsible, unwed fathers. The unwed father in this case was the unwed father of the children involved who lived with and supported the children all their

lives. The state statute challenged here sought to automatically take the children from the father at the death of the mother since the state statute specified that an unwed father was not a parent. The state presumed an unwed father was unfit and did not even grant him the right to a hearing to prove he was a fit parent. This unwed father challenged the statute under the Due Process and Equal Protection Clauses. This Court determined that the unwed father had a fundamental liberty interest in this already nurtured and established parent/child relationship. He was, therefore, to be guaranteed the due process rights that would protect his interest in retaining custody of his children. The state statute was declared unconstitutional in that a hearing was not provided the unwed father when the issue at stake was the dismemberment of his family.

In Caban v. Mohammed, 441 U.S. 380 (1979), this Court again recognized a responsible, unwed father's constitutionally protected interest in his parent/child relationship. The unwed father had lived with the children and the mother for several years. The unwed father's name was on the birth certificates. The unwed father frequently saw and maintained contact with the children. Caban sought to prevent the adoption of his natural children by the children's step-father. However, the state in which he resided allowed only natural mothers to veto the adoption of natural children. Caban claimed this statute violated the Equal Protection Clause of the Fourteenth Amendment. This Court agreed due to the already established parent/child relationship.

Petitioner properly belongs in that category of parent who never chose a commitment to parental responsibilities and

were found undeserving of substantial protection under the Due Process Clause. Quilloin v. Walcott, 434 U.S. 246 (1978); Lehr v. Robertson, 463 U.S. 248 (1983).

Leon Quilloin fathered a child in 1964. That child was in the custody and control of her mother for her entire life. Her biological father and mother never married or established a home together. The father did permit the mother to use his name on the child's birth certificate. He had contact with the child and gave the child gifts. In 1967, the mother married someone other than the child's father. In 1976, the child's step-father expressed a desire to adopt the child. After receiving notice and a hearing, Leon Quilloin attempted to block the adoption and then secure visitation rights. Quilloin did not seek custody of the child or object to her living with her mother and step-father.

In the state in which the parties

resided, a biological father who has not legitimized a child could not veto the adoption of that child. Quilloin challenged this statute on due process and equal protection grounds. This Court unanimously made it clear that an unwed father who has never shouldered or sought any significant responsibility with respect to the daily supervision, education, protection or care of his child is not entitled to the same constitutional protections as an unwed father who had by choice been in a substantial way a member of the child's family unit, defacto or otherwise. This Court made it quite clear that the Due Process Clause would be offended if the state was attempting to destroy a family unit, but that such was not the case under these facts. In fact, this Court acknowledged the state's strong interest and even went so far to say that the child's and the state's interests in creating and preserving a family unit were more substantial

than the unwed father's interest since it was not the "cognizable and substantial" interest of companionship, care, custody and management "of his child". Quilloin v. Walcott, 434 U.S. 246 (1978).

In Cory Michael Minnich's lifetime, Petitioner has never expressed one scintilla of interest in the "companionship, care, custody and management" of the child. The only interest ever expressed was the interest not to be deprived of the money Petitioner was found to owe to the child as a duty of support. Surely this interest does not deserve extra constitutional protection under the guise of due process.

Similarly, in Lehr v. Robertson, 463 U.S. 248 (1983), an unwed father claimed his due process rights were violated because he never received notice and did not have the opportunity to be heard before his biological child was adopted. This Court analyzed the constitutional protection due an unwed,

biological father's inchoate relationship with a two (2) year old child he never supported and rarely saw. The facts are somewhat similar to Quilloin, 434 U.S. 246, in that the unmarried father objected to not receiving notice and the opportunity to be heard prior to the adoption of his child by her step-father. The biological father contended that his interest in an actual or potential relationship with a child born out-of-wedlock was a liberty interest which could not be destroyed without due process of law, i.e. prior notice and the opportunity to be heard before he was deprived of that interest.

This Court began with an analysis of the parent/child relationship. "The intangible fibers that connect parent and child have infinite variety. They are woven throughout the fabric of our society, providing it with strength, beauty and flexibility. It is self-evident that they

are sufficiently vital to merit constitutional protection in appropriate cases. Lehr was not one of the appropriate cases. The Court found that there was a clear and significant distinction between a mere biological relationship and an actual relationship of parental responsibility. As Justice Stewart stated in Caban v. Mohammed, 441 U.S. 397, "Even if it be assumed that each married parent after divorce has some substantive due process right to maintain his or her parental relationship, it by no means follows that each unwed parent has any such right. Parental rights do not spring full-blown from the biological connection between parent and child. They require relationships more enduring." This Court has consistently held that only when a biological, unwed father demonstrates a free commitment to parental responsibilities by coming forward to participate in his child's life does that father's interest in personal contact acquire

substantial protection under the Due Process Clause. Jonathan Lehr did not demonstrate such a commitment. Neither did Gregory L. "Pete" Rivera, Petitioner.

II. IN THE ALTERNATIVE, AN ANALYSIS OF THE DUE PROCESS REQUIREMENTS VIA MATHEWS V. ELDRIDGE DEMONSTRATES THAT THE INTERESTS OF JUSTICE DEMAND A NEAR ALLOCATION OF RISK BETWEEN THE CHILD, THE FATHER, THE MOTHER AND THE STATE.

The preponderance of the evidence standard specified by the Pennsylvania Legislature does not violate the due process Clause of the Fourteenth Amendment of the United States Constitution. U.S. Const. Amend. XIV, Section 1. The Due Process analysis requires consideration of three (3) distinct factors. First, the private interests that will be affected by the official action; second, the risk of an erroneous deprivation of such interests through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and, third, the governments's interest, including the function involved and the fiscal and

administrative evidence that the additional or substitute procedural requirement would entail. Mathews v. Eldridge, 424 U.S. 319 (1976).

A. THE CHILD'S INTERESTS ARE PARAMOUNT IN A PATERNITY PROCEEDING. TO SUBJECT THE CHILD'S COMMANDING INTERESTS TO THE CLEAR AND CONVINCING STANDARD IS TO HOLD THE CHILD RESPONSIBLE FOR THE IRRESPONSIBLE LIAISON OF THE UNWED PARENTS. VISITING THIS CONDEMNATION UPON THE HEAD OF THE INFANT IS ILLOGICAL AND UNJUST.

The establishment of the parent/child relationship is the most fundamental right a child possesses. It is to be equated with personal liberty and the most basic constitutional rights.

The preponderance of evidence standard used in a civil paternity suit satisfies due process for two (2) main reasons. First, it fairly protects the interests of all the parties involved.

Second, it expresses basic public policy that affirms the family's effectiveness as a social institution. Increasing the evidentiary standard puts an unjust and illogical burden on the child. In fact, increasing the standard of proof raises the impenetrable barrier that works to shield otherwise invidious discrimination against the child. Gomez v. Perez, 409 U.S. 535, 538 (1973).

Since 1968, this Court has consistently held that children born out-of-wedlock are as deserving of the equal protection of our laws as any other person. These cases ended a long history of treating children born out-of-wedlock as nonpersons. Levi v. Louisiana, 391 U.S. 68 (1968); Glona v. American Guardian and Liability Insurance Company, 391 U.S. 73 (1968); Weber v. Aetna Casualty and Surety Company, 406 U.S. 164 (1972); Dairs v. Richardson, 342 F. Supp. 588 (D. Comm.), affirmed,

409 U.S. 1069 (1972); Gomez v. Perez, 409 U.S. 535 (1973); New Jersey Welfare Rights Organization v. Cahill, 411 U.S. 619 (1973); Jimenez v. Weinberger, 417 U.S. 628 (1974); Trimble v. Gordon, 430 U.S. 762 (1977); United States v. Clark, 445 U.S. 23 (1980); Mills v. Habluetzel, 456 U.S. 91 (1982).

The result of these cases was to insure that children born out-of-wedlock receive: recovery under a wrongful death statute following death of a mother; workman's compensation; Social Security benefits; paternal support; inheritance through intestate succession; survivor's benefits under the Civil Service Retirement Act; and a fair statute of limitations in which paternity actions may be filed.

The importance of these legal rights to the child cannot be understated. However, the child's right to know the identification of both parents is even more profoundly fundamental. What a child knows

and imagines about his or her biological family helps to mold the child's self-perception. This parental identification provides the child with a sense of identity and roots. The child will possess similar personality traits and health problems as his or her parents. Biological parents, even when they choose to be anonymous, inadequate and uncaring, continue to be significant in a child's development.

An illegitimate child's right to and need of a legal relationship with his or her father is unquestionable. The child has a more weighty right to know and obtain support from his or her father. Irresponsible, unwed fathers do not have a fundamental right to evade this most elementary of human obligations - parental responsibility. The societal value that the primary obligation of child raising falls to the parent not the state is reflected in the state's recognition that the interests of the

parties in a paternity suit are equal thereby requiring the preponderance of evidence standard to prove paternity.

B. THE INTERESTS OF THE FATHER ARE PURELY MONETARY. IN FACT, MONEY IS THE ONLY THING THE COURT CAN DEMAND FROM AN UNCARING PARENT. THE LOVE A PARENT HAS FOR A CHILD COMES FROM A CHOSEN RELATIONSHIP, NOT A COURT ORDER.

The issue for the father is one of shifting economic interests. The only thing asked of Petitioner is financial support for his child. Petitioner's brief makes it very clear that his property interests are jeopardized and lists them all very succinctly. There is no need for Respondent to repeat these property interests and concedes that Petitioner has these property interests. The United States Constitution does not now and never has stood for the premise that a parent's property rights deserve more due process rights than the

rights of his illegitimate child.

Petitioner claims his liberty interests are jeopardized when he is found to be the father of a child born out-of-wedlock. As in any civil proceeding, one who willfully disobeys a court order can be held in contempt. Petitioner's chances of being held in contempt and thereby deprived of his liberty are small. First, it must be found that Petitioner's failure to pay child support was willful. There must be a hearing scheduled before a judge. Petitioner must be given proper notice of the hearing. Should it be found that Petitioner has willfully not paid child support, he may be held in contempt. Petitioner carries the keys to the prison in his pocket. Every contempt order must state a purge amount. 42 Pa.C.S.A. 6708; 23 Pa.C.S.A. 4345 (supp. 86). Furthermore, should Petitioner be indigent, he cannot be held in contempt of

court. Wright v. Hendrick, 455 Pa. 36, 312 A.2d 402 (1973). To argue that his liberty interest is substantial in a contempt proceeding thereby requiring the clear and convincing standard pales to the liberty interest at stake during criminal sentencing where only a preponderance standard is constitutionally required to impose a mandatory five (5) year prison sentence. McMillan v. Pennsylvania, 477 U.S. ____, 106 S.Ct. ____, 91 L.Ed.2d 67 (1986).

Petitioner claims a potential for criminal liability. Effective June 27, 1978, the Pennsylvania Civil Procedure Support Law abolished the right to a criminal proceeding on the issue of paternity. Act No. 1978-46, P.L. 106, amending the Act of July 13, 1953, P.L. 431. The 1978 amendment clearly expresses the legislature's intent to make determination of support for children born out-of-wedlock purely a civil action. The legislature also expressly provided that

the burden of proof be a preponderance of the evidence. 42 Pa.C.S.A. 6701, et seq.

Petitioner also claims the potential for the deprivation of liberty under the Pennsylvania Crimes Code, Endangering the Welfare of Children, 18 Pa.C.S.A. 4303. Pennsylvania case law makes it clear that this statute is used only where a child has been sexually or physically assaulted, physically abandoned or otherwise put at bodily risk.

C. THE INTERESTS OF THE MOTHER ARE THOSE OF A RESPONSIBLE PARENT. SHE WANTS FINANCIAL SUPPORT FOR THE CHILD ALONG WITH THE SENSE OF DIGNITY OF KNOWING SOCIETY HAS RECOGNIZED THE FATHER AS WELL AS THE MOTHER OF THE CHILD.

The mother assumes the primary responsibility for support - emotional, physical and financial - for her illegitimate child. Because she assumes these responsibilities, she has a keen interest

in receiving help from the child's biological father in raising and caring for the child.

The mother or the state takes responsibility for the childbirth expenses. The mother experiences a birth-related loss of income. The disapproval of family and community is felt by the mother. Emotional strain and confusion often accompany the birth of an illegitimate child. The mother of an illegitimate child is often a minor. This means school is interrupted or denied and that marketable skills are not acquired. Low educational attainment results in marginal or no employment which means poverty-level existence for the mother and the child.

> According to the 1983 Current Population Survey on Child Support and Alimony conducted by the Census Bureau, 8.7 million women were caring for children whose fathers were absent from the home. Only 58 percent of them had court orders or agreements to receive child support and even of this relatively fortunate group who

were actually supposed to receive payments in 1983, half received just partial payment or no payment at all during the course of the year. The unpaid child support bill for 1983 alone: $3 billion. Moreover, the average amount of child support received by a family in 1983 was only $2,341. "These figures," said former HHS Secretary Margaret M. Heckler, "Document a widespread and shameful situation in our country - the nonsupport of children by their own parents." One half of marriages that took place in the 1970's will end in divorce. Out-of-wedlock births as a proportion of live births climbed from less than 11 percent in 1970 to about 20 percent in 1982. As a result, the plight of the single-parent family - 90 percent of them headed by women - has become a familiar feature on the landscape of American society. The median annual income of female-headed families in 1983 was $12,800 and fully one-third of these families were poor. The brunt of this poverty falls on the children. The Census Bureau found that in 1983, 55 percent of children living in female-headed households were poor - four times the rate for children in other households. Clearly, the financial abandonment of children by one parent contributes significantly to their poverty.

"A Decade of Child Support Enforcement 1975-1985", Volume I, U.S. Department of Health and Human Services, Office of Child Support Enforcement, Tenth Annual Report to Congress for the Period Ending September 30, 1985, page 1.

D. THE INTERESTS OF THE STATE ARE NOT PARAMOUNT TO THE CHILD'S INTERESTS. HOWEVER, THE STATE'S INTERESTS ARE SUBSTANTIAL. THE STATE'S INTEREST IN LEGISLATING MATTERS RELATED TO FAMILIES IS STRONG. THE STATE HAS A STRONG INTEREST IN THE PARENTS TAKING FINANCIAL RESPONSIBILITY FOR THEIR CHILDREN. THE STATE'S MONETARY BURDEN FOR THE DAILY LIVING COSTS OF CHILDREN BORN OUT-OF-WEDLOCK IS EXTRAORDINARY AND INCREASING.

The function of a legislative body elected by the people has long been held to be primary. The legislative role has been fortified by the presumption of right and legality. A legislative decision is not to be interfered with lightly by any judicial concept of wisdom or propriety. Weems v. United States, 217 U.S 49, 379 (1910).

Notably, the interests of states in family related matters has been well respected by the Court in both theory and precedent. United States v. Yanzell, 382 U.S. 341 (1966).

In 1978, the General Assembly of Pennsylvania repealed Section 4323 of the Crimes Code, 18 Pa.C.S.A. §4323, related to neglect to support an illegitimate child, and amended the Civil Procedural Support Law to make paternity a civil action in accordance with the Rules of Civil Procedure. The General Assembly specifically chose the preponderance of evidence standard as the applicable burden of proof. 42 Pa.C.S.A. §6704(g). The decisions of the General Assembly should be given serious weight in the Court's analysis of interests in its application of due process principles. As this Court held in Missouri, Kansas and Texas R. Co. v. May, 194 U.S. 267 (1904),

"Great constitutional provisions must be administered with caution. Some play must be allowed for the joints of the machine, and it must be remembered that legislatures are ultimate guardians of the liberties and welfare of the people in quite as great a degree as the courts."

This Court is required to correct clear constitutional violations in state statutes. Beyond this examination to ensure constitutional fairness, the Court's historic role in establishing standards of proof that states must follow in judicial proceedings is limited. After reviewing the competing interests at stake in the case at bar, especially the child's compelling interests, the Court will be able to decide that there is no due process violation in Pennsylvania's choice of the preponderance standard. The integrity of the Pennsylvania Legislature, as well as the legislatures of a majority (41) of the other 50 states who require the

the preponderance standard, and the integrity of the states' role in the federalist system of government should be respected. The state's choice to promote parent/child relationships, not prevent them, should be upheld by the Court.

Furthermore, the State has a strong interest in unwed fathers being held responsible for some or all of their children's financial support. Mothers of children born out-of-wedlock are more often than not forced to go on the welfare rolls after a child is born. This is especially true of teenage mothers who are unwed.

The State's concern is reflected in the Child Support Enforcement Amendments of 1984. 42 U.S.C. 1305. The purpose of the amendment is to assure that all children regardless of the circumstances will receive financial assistance from their parents. The amendment requires each state to increase its statute of limitations to 18 years for

paternity actions in order to alleviate the financial burden already placed on the state for assuming responsibility of financial support for children born out-of-wedlock.

Illegitimacy rates have increased in alarming proportions. Out-of-wedlock births climbed from less than 11 percent in 1970 to about 20 percent in 1982. "A Decade of Child Support Enforcement 1975-1985," U.S. Department of Health and Human Services, Office of Child Support Enforcement, Volume I, page 1. In 1983, the National Center for Health Statistics reports that 737,893 children were born out-of-wedlock in the United States. In 1984, the numbers increased by 4 percent to 770,353. Estimates are that the number of children born out-of-wedlock rose to the highest level in 1984 since 1940. National Center for Health Statistics, Monthly Vital Statistics, Volume 35, #4 Supplement, July 18, 1986.

Of the 770,353 children born out-of-wedlock in 1984, it is estimated that 580,000 of the children were born to teenagers between the ages of 13-19. The financial impact of these figures is shown by the following:

> Teenagers who become mothers are disproportionately poor and dependent on public assistance for their economic support (Moore and Burt, 1982; Furstenberg, 1976; Presser, 1975). Estimates of welfare expenditures to adolescent mothers in 1975 suggest that approximately 50-56 percent of the Aid to Families with Dependent Children (AFDC) budget in that year was directed to households in which the mother was a teenager at the time her first child was born. These households accounted for approximately $5 billion in AFDC expenditures, when food stamp benefits were also considered, the total approached $6.5 billion (Moore, 1978; Moore et al., 1981). In addition, because AFDC recipients are also eligible for Medicaid benefits, the total rises by another $2.1 billion ($934 million for Medicaid services to the children of teenage mothers and $1.2 billion for adolescent mothers themselves) when health care costs are added. In all, Moore et al. (1981) estimated that more than $8.6 billion in

> public assistance through these three programs was provided to households in which the mother was an adolescent parent in 1975. A more recent estimate of 1985 outlays suggests that total welfare-related expenditures attributable to teenage child-bearing has nearly doubled in the past 10 years, to $16.6 billion: $8.3 billion for AFDC, $3.4 billion for food stamps, and $4.9 billion for Medicaid (Burt, 1986). As with the earlier estimate, the 1985 figure is conservative, since it includes only sums expended in the three major programs.

Risking the Future: Adolescent Sexuality, Pregnancy and Childbearing, Volume I, National Academy of Science, National Academy Press, 1987.

E. THE PROCESS AFFORDED PETITIONER IS MORE THAN ADEQUATE. TO INCREASE THE BURDEN OF PROOF TO THE INNOCENT CHILD'S DETRIMENT MEANS THAT THE CHILD IS THE PARTY WHO STANDS TO SUFFER AN ERRONEOUS DEPRIVATION AND AN EGREGIOUS LOSS.

The final prong of the due process analysis calls for a look at the legal

process that was afforded Petitioner. The final analysis also demands a look at the erroneous deprivation and egregious loss the process would cause.

The following analysis will show that the process afforded Petitioner was exceedingly generous and more than adequate to protect Petitioner's due process rights. The analysis will also show that the very language of the clear and convincing standard would present the child with a burden so unequal that the standard of proof would become an invidious barrier and a form of discrimination against the child. This discrimination is forbidden by Gomez v. Perez, 409 U.S. 535 (1973). Not only is the language a form of invidious discrimination, but the effect would be to erroneously, unjustly, deprive the child of the right to know a parent, surely an egregicus loss for the child.

The beauty of the Due Process Clause is its ultimate goal in assuring justice in our adversary legal system. It has long been the rule that the two (2) basic tenets of due process are the right to be heard and the right to notice. McVeegh v. United States, 78 U.S. (11 Wall) 259, 267 (1870). The due process rights accompanying the hearing component are the right to present evidence, Morgan v. United States, 304 U.S. 1, 18 (1938), and the right to confront and cross-examine witnesses. Green v. McElroy, 360 U.S. 474, 497 (1959). The procedural rights afforded Petitioner more than fulfill the due process requirements.

Petitioner was afforded the opportunity to be heard by way of a jury trial, representation by counsel, and access to blood tests.

The Pennsylvania civil support statute governing paternity proceedings afforded Petitioner the right to a bench

trial or a jury trial. 42 Pa.C.S.A. 6704(g). Petitioner chose a jury trial. The right to trial fulfilled the due process requirements of presenting evidence, confronting and cross-examining witnesses.

Petitioner was represented by privately retained counsel. Had Petitioner been indigent, he would have received a court appointed attorney. Corra v. Coll, 305 Pa. Super. 179, 451 A.2d 480 (1982). This right to counsel is not even afforded indigent parents at a parental termination hearing where a fundamental liberty interest - the family - can be destroyed. Lassiter v. Department of Social Services, 452 U.S. 18 (1981).

Another procedural safeguard afforded Petitioner as a component of proper hearing was access to blood tests. The Court recognized the unique ability of blood test groupings to all but eliminate errors

in the proof of paternity. Little v. Streater, 452 U.S. 1 (1981). The Court's response in Little countered the risk created by a state's onerous evidentiary rule that a putative father's testimony alone was insufficient to overcome the mother's prima facie case. The putative father reasoned that he could not be properly "heard" without blood tests and this Court agreed. Pennsylvania does not have the same evidentiary rule. However, Pennsylvania has seen the wisdom in this Court's validation of the reliability of blood test groupings and afforded Petitioner access to blood tests. 42 Pa.C.S.A. 6133 et seq.; Turek v. Hardy, 312 Pa. Super. 158, 458 A.2d 562 (1983).

The recognition of the probative value of blood test groupings came as a result of the release of joint American Medical Association-American Bar Association guidelines for serologic testing in paternity

cases. "Joint AMA-ABA Guidelines: Present States of Serologic Testing in Problems of Disputed Parentage", 10 Fam.L.Q. 247 (1976). The guidelines acknowledged that human leukocyte antigen tests were a powerful scientific tool for resolving paternity issues. Little v. Streater, 452 U.S. 1, 8; Mills v. Habluetzel, 456 U.S. 91, footnote 4.

Forty-nine states and the District of Columbia have statutes which recognize the relevance of blood tests and allow them to be used as evidence in paternity proceedings. The probative value of blood tests have been recognized by the appellate courts of many states as well. Cramer v. Morrison, 88 Cal. App. 3d 873, 153 Cal. Rptr. 865 (1979); Tice v. Richardson, 7 Kan. App. 2d 509, 644 P.2d 490 (1982); Commonwealth v. Blazo, 10 Mass. App. 13, 406 N.E. 2d 1323 (1980); Hennepin County Welfare Board v. Ayers, 304 N.W. 2d 879 (1981); Malvasi v.

Malvasi, 167 N.J. Super. 513, 401 A.2d 279 (1979); Commissioner of Social Services v. Lardo, 100 Misc. 2d 220, 417 N.Y.S. 2d 665 (1979); Turek v. Hardy, 312 Pa. Super. 158, 458 A.2d 562 (1983).

The legal and medical recognition of the value of blood test groupings is indisputable and continues to grow. "Guidelines for Reporting Estimates of Probability of Paternity in Inclusion Probabilities in Parentage Testing." American Association of Blood Banks, 1983, Journal of the American Medical Association, Vol. 253, No. 22, June 14, 1985, p. 3298; Polesky and Lenty, "Parentage Testing: An Interface between Medicine and Law," North Dakota Law Review, Vol. 60:727 (1984); Page - Bright, "Proving Paternity - Human Leukocyte Antigen Test," Journal of Forensic Sciences, JFSCA, Vol. 27, No. 1, Jan. 1982, pp. 135-153; Houtz, Brooks, Wenk, and Dawson, "Utility of HLA and Six

Erythrocyte Antigen Systems in Excluding Paternity amoung 500 Disputed Cases," Forensic Science International, 17 (1981), pp. 211-218; Strond and Galindo, "Paternity Exclusion by HLA Phenotyping the Parents of an Alleged Father," Texas Medicine, 79(11), 1983, November, pp. 54-57.

As to the due process requirement regarding notice, as in any other civil proceeding, Petitioner is required to be properly served with notice that a support complaint has been filed on behalf of a minor child to whom duty of support is owing. 42 Pa.C.S.A. §6704. This notice contains the support complaint and an order directing the putative father to appear for a domestic relations conference before a domestic relations hearing officer. The putative father either acknowledges or denies paternity of the child at the hearing. If the putative father denies paternity, the conference is terminated and the

putative father is given notice of his right to a trial with or without a jury. Pennsylvania Rules of Civil Procedure, Rule 1910.15. The putative father is permitted pre-trial discovery by special order of the court. Pennsylvania Rules of Civil Procedure 1910.9. Petitioner is also granted the full panoply of post-trial rights, as is evidenced by the present appellate position of this case. Pennsylvania Rules of Civil Procedure 1910.15(c-f). Once post-trial issues are resolved in favor of the child the doctrine of res judicata applies in order to protect the best interests of the child. Commonwealth ex rel. Nedzwecky v. Nedzwecky, 203 Pa. Super. 179, 199 A.2d 490 (1964).

Petitioner has been afforded a panoply of due process protections and still clamors for more. Clearly, his total disinterest in his child does not require more constitutional protection than it is

already afforded. For Petitioner to claim that he is entitled to a stricter burden of proof in addition to all the existing procedural safeguards is so unfair as to offend our system's basic sense of justice. The very language of the clear and convincing standard could well deprive the child of a fair chance to prove parentage.

The clear and convincing standard states "The witness must be found to be credible, that the facts to which they testify are distinctly remembered and the details thereof narrated exactly and in due order, and that their testimony is so clear, direct, weighty and convincing as to enable the jury to come to a clear conviction, without hesitancy, of the truth of the precise facts in issue. "In re estate Fichert v. Lord, 461 Pa. 653 (1975).

The intermediate standard usually uses some combination of the words clear, cogent, unequivocal and convincing. It is

typically used in civil proceedings where the interests are more substantial than money, i.e. where one risks having a reputation tarnished; to protect one from unusually drastic consequences, such as the termination of already established parent/child relationship, deportation, denaturalization and involuntary commitment to a mental institution. Addington v. Texas, 441 U.S. 424 (1979).

An analysis of the language shows that the clear and convincing standard is much closer to the beyond a reasonable doubt standard. The language of the clear and convincing standard clearly presents the child with a burden so unequal, in that it is so much weightier than the father's, that it becomes an invidious barrier and a form of discrimination in itself. This discrimination is prohibited by Gomez v. Perez, 409 U.S. 535 (1973). A higher standard would stand for societal punishment of the child for being

born out-of-wedlock.

In fact, in a paternity jury trial in which the clear and convincing standard was used, following the Court of Common Pleas opinion, the child lost the case, in spite of a 99.44 percent probability of paternity result on a human leukocyte antigen blood test.

One of the functions of the standard of proof is to tell the fact finder how society wishes the risk of error to be distributed between litigants. Addington v. Texas, 441 U.S. 418 (1979). A higher burden of proof placed on the innocent child would stand for society's judgment that the child should be punished for being born out-of-wedlock. Clearly, this result would be illogical and unjust.

CONCLUSION

For the reasons stated, the Supreme Court of Pennsylvania's decision should be affirmed.

Respectfully submitted,

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APPENDIX A_

42 Pa.C.S.A 6704(g)

Commencement Of Support Actions

(g) Trial Of Paternity -- Where the paternity of a child born out-of-wedlock is disputed, the determination of paternity shall be made by the court without a jury unless either party demands trial by jury. The trial, whether or not a trial by jury is demanded, shall be a civil trial and there shall be no right to a criminal trial on the issue of paternity. The burden of proof shall be by a preponderance of the evidence.

APPENDIX B

42 Pa.C.S.A. 6708(a)

Enforcement Of Support Orders

(a) General Rule -- A defendant who willfully fails to comply with any order under this subchapter, except an order subject to section 6705 (relating to failure of defendant to appear), may, after hearing, be adjudged in contempt and committed to prison by the court.

APPENDIX C

42 Pa.C.S.A. 6133

Authority For Test

In any matter subject to this subchapter in which paternity, parentage or identity of a child is a relevant fact, the court upon its own initiative or upon suggestion made by or on behalf of any person whose blood is involved may, or upon motion of any party to the action made at a time so as not to delay the proceedings unduly, shall order the mother, child and alleged father to submit to blood tests. If any party refuses to submit to such tests, the court may resolve the question of paternity, parentage or identity of a child against such party, or enforce its order if the rights of others and the interests of justice so require.

APPENDIX D

42 Pa.C.S.A. 6711

Duties Of District Attorney

(a) General Rule -- The district attorney shall at all times aid in the enforcement of the duty of support and shall cooperate with the domestic relations section in the presentation of complaints or in any proceeding designed to obtain compliance with any order of the court.

(b) Representation Of Complainant -- The district attorney, upon the request of the court or a Commonwealth or local public welfare official, shall represent any complainant in any proceeding under this subchapter.

APPENDIX E

Pa.R.Civil Proc. 1910.15(a-f)

Rule 1910.15 Paternity

(a) If the action seeks support for a child born out-of-wedlock and the reputed father is named as defendant, the defendant may acknowledge paternity in a verified writing substantially in the form provided by Rule 1910.28(a). In that event the action shall proceed as in other actions for support.

(b) If the reputed father does not execute an acknowledgment of paternity, the domestic relations officer shall terminate the conference. He shall advise the parties that there will be a trial without jury on the issue of paternity unless within ten days after the conference either party demands a trial by jury as provided by Rule 1910.28(b).

Note: See Section 6131 of the Judicial Code, 42 Pa.C.S. §6131 et seq., for the Uniform Act on Blood Tests to Determine Paternity.

(c) Post-trial proceedings shall be governed by Rules 227.1 to 227.4 inclusive and shall be limited to the issue of paternity.

(d)(1) If the verdict or decision is for the defendant on the issue of paternity, unless a post-trial motion is filed and sustained, a final order shall be entered, on praecipe or by the court, dismissing the action as to the child; or

(2) If the verdict or decision is against the defendant on the issue of paternity, unless a post-trial motion is filed and sustained, an interlocutory order shall be entered, on praecipe or by the court, finding paternity.

(e) After an interlocutory order is entered finding that the defendant is the father of the child, the court shall either refer the case to a conference as in other actions for support or as expeditiously as possible

hold a hearing on the issue of the amount of support and shall enter a final order of support.

(f) The interlocutory order of paternity is not an appealable order but any issue of paternity raised in a post-trial motion may be included in an appeal from a final order of support.